2004

Utah v. Alan Reed Fitz : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. ALAN REED FITZ, Defendant/Appellant.	Case No. 20040552-CA

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, UTAH COUNTY, STATE OF UTAH, FROM A CONVICTION OF ASSAULT (d.v.), A CLASS B MISDEMEANOR, AND DOMESTIC VIOLENCE IN THE PRESENCE OF A CHILD, A CLASS B MISDEMEANOR, BEFORE THE HONORABLE DEREK P. PULLAN

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred in finding that the evidence was sufficient to establish, beyond a reasonable doubt, that Fitz did not act in self-defense? "A defendant is entitled to an acquittal if based upon the whole evidence in the case there is a reasonable doubt as to whether or not the defendant acted in self-defense." *State v. Jackson*, 528 P.2d 145, 147 (Utah 1974). *See also*, *State v. Torres*, 619 P.2d 694, 695 (Utah 1980) (defendant has no particular burden of proof but is entitled to acquittal if there is any basis in the evidence sufficient to create reasonable doubt). When reviewing challenges to the sufficiency of the evidence from a bench trial this Court will reverse if the findings are against the clear weight of the evidence, or if this Court "otherwise reaches a definite and firm conviction that a mistake has been made." *State v. Strieby*, 790 P.2d 98, 100 (Utah App. 1990) (citations omitted). "This standard of review is less deferential than that applied in a jury trial because of the multi-member versus single fact

finder, and requires that the evidence presented not be contrary to the verdict." *Id.* (citing *State v. Goodman*, 763 P.2d 786, 786-87 (Utah 1988)).

This issue was preserved in an oral motion for directed verdict (R.41 at 31-38) and during closing argument (R. 41 at 83-90).

CONTROLLING STATUTORY PROVISIONS

Utah Code Annotated § 76-5-402

(1) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

(a) the nature of the danger;

(b) the immediacy of the danger;

(c) the probability that the unlawful force would result in death or serious bodily injury

(d) the other's prior violent acts or violent propensities; and

(e) any patterns of abuse or violence in the parties' relationship

Utah Code Annotated § 76-5-109.1

(2) A person is guilty of child abuse is the person:

(c) under circumstances not amounting to a violation of Subsection (2)(a) or (b), commits an act of domestic violence in the presence of a child.

(3)(b) A person who violates Subsection (2)(c) is guilty of a class B misdemeanor.

Utah Code Annotated § 77-36-1(2)

"Domestic violence" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence of physical harm, when committed by one cohabitant against another. "Domestic violence also means commission or attempt to commit, any of the following offenses by one cohabitant against another:

(b) assault, as described in Section 76-5-102....

STATEMENT OF THE CASE

A. Nature of the Case

Alan Reed Fitz appeals from the judgment, sentence and commitment of the Fourth District Court after he was convicted of assault, a class B misdemeanor, and domestic violence in the presence of a child, a class B misdemeanor.

B. Trial Court Proceedings and Disposition

Alan Fitz was charged by information filed in Fourth District Court on October 29,

2003, with assault, a class B misdemeanor, in violation of Utah Code Annotated § 76-5-102(1); domestic violence in the presence of a child, a class B misdemeanor, in violation of Utah Code Annotated § 76-5-109.1(2)c), and reckless endangerment, a class A misdemeanor, in violation of Utah Code Annotated § 76-5-112 (R. 9).

On April 21, 2004, a bench trial was held before the Honorable Derek P. Pullan (R. 23-24, 41). At the close of the State's case, Fitz motioned the trial court for a directed verdict on all counts (R. 41 at 31-38). After deliberation, Judge Pullan denied the motion as to count I (assault) and count II (domestic violence in the presence of a child) and dismissed count III (reckless endangerment) (R. 23, 41 at 50-52).

After presentation of all the evidence, Fitz argued to the trial court that the State did not prove beyond a reasonable doubt that he did not act in self-defense and that therefore, he must be acquitted on the assault charge. (R. 41 at 83-90). Fitz also argued, accordingly, that if he had not committed any underlying criminal act then he could not be convicted of committing domestic violence in the presence of a child (R. 41 at 90). After taking the matter under advisement, Judge Pullan convicted Fitz on both charged finding that "the State has met its burden of proof that they have convinced me beyond a reasonable doubt that the defendant did not act in self-defense" (R. 41 at 92).

On May 26, 2004, Fitz was sentenced to 18 months court probation. As part of his probation, Fitz was ordered to pay a fine in the amount of $500.00 and to spend 10 days in the work diversion program at the Utah County Jail (R. 30-31). Fitz was also ordered to complete a domestic violence assessment at DCFS and to follow through with any recommended treatment (Id.).

On June 25, 2004, Fitz filed a notice of appeal with the Fourth District Court (R. 38).

STATEMENT OF RELEVANT FACTS

A. Testimony of Deputy JoAnn Murphy

On September 26, 2003, at approximately 3 a.m., JoAnn Murphy and Jodi Scott, deputies in the Utah County Sheriff's office, were dispatched to 1803 Cedar Street, Eagle Mountain (R. 41 at 8-11). Brenda Fitz answered the door carrying a crying two-week old baby and invited the officers into the home (R. 41 at 11, 18). Brenda was also crying (R. 41 at 13). At the time the officers came into the residence, Alan Fitz was slouched into an easy chair (R. 41 at 13, 21). Alan was "groggy, almost asleep" (Id.).

Based upon the "level of agitation on the lady's face, her crying, the baby crying, [Deputy Murphy] determined that there appeared to have been some type of altercation that took place in the residence" (R. 41 at 13). Murphy testified that she was told by both parties–Alan and Brenda–that they were married (R. 41 at 14).

Murphy testified that she removed Brenda from the residence and spoke with her outside while another deputy spoke with Alan inside the residence (R. 41 at 15-16). Subsequently, the deputies traded places and Murphy went inside and spoke with Alan (R. 41 at 16). The officers then got together and "compared notes, compared stories" before making a determination on how to proceed (R. 41 at 16).

Murphy testified that Alan

> had been asleep on the couch, that his wife had been nagging him, that she had been yelling at him and he was trying to ignore her. He indicated that she reached down and slapped him [with an open hand] and he lost his temper, said he came off the couch and punched her several times while she was holding the baby

(R. 41 at 16-17, 22). Murphy was not aware of any physical altercation which took place

before Brenda slapped Alan (R. 41 at 22).

In response to a question about whether the baby was in Brenda's arms at the time of the altercation, Murphy testified: "In my interview with him, [Alan] stated, 'I know I shouldn't have done it. I just lost my temper.' He knew that she was holding the baby while he was hitting her" (R. 41 at 20)[1]. However, no recording of the conversation was made and Murphy acknowledged that she doesn't know exactly what Alan said, but she believes he was acknowledging remorse for his response and his awareness that Brenda was holding the baby (R. 41 at 25-26).

Murphy testified that she observed red marks on Brenda's arms and shoulders (R. 41 at 17, 23). Murphy testified that the red marks appeared to be "defensive type of injuries" (R. 41 at 18). Murphy testified that she took photographs of the red marks but "they did not turn out" (R. 41 at 24). Murphy acknowledged that she had not seen an adult who has suffered a substantial injury from a punch to an arm (R. 41 at 26).

Murphy testified that she could not recall seeing a red mark on Alan's face (R. 41 at 26). Murphy acknowledged that people can be dazed and confused upon be awoken (R. 41 at 29).

Ultimately, the officers decided that Alan was the "primary aggessor" and he was arrested for assault (d.v.) and domestice violence in the presence of a child (R. 41 at 16).

Murphy identified Fitz at court but admitted on cross-examination that prior to trial she asked another public defender if he was Fitz (R. 41 at 21).

Alan and Brenda divorced sometime between this incident and the trial (R. 41 at).

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[1]On cross-examination, Murphy testified more specifically that "In my interview with him in our discussion, I asked him, 'You realize you've hit your wife while she's holding your child?' He stated clearly, 'I know I shouldn't have done it, but I lost my temper.'"

Brenda moved to Wyoming (R. 41 at). She was issued a subpoena but chose not to attend the trial (R. 17-18, 41).

B. Testimony of Alan Fitz

Alan testified that on the night in question, the baby awoke and Brenda got her and turned on the bedroom light (R. 41 at 66). This disturbed Alan and he told Brenda that he was going to sleep on the living room couch (R. 41 at 66). A verbal dispute started as he walked out of the bedroom and Brenda came out of the bedroom and was yelling at Alan while he lay on the couch (R. 41 at 67-68). Alan testified that he did not know how long the yelling continued because he "fell asleep" at approximately 2:15-2:30 a.m. (R. 41 at 68).

While he was sleeping on the couch, he was awaken by being struck or slapped across the face (R. 41 at 54). Alan testified that he woke up dazed and that he did not know exactly what had happened or why it happened (Id.). He initially thought he had been struck by an object but subsequently discovered a red mark on his face and realized he had been slapped by an open hand (R. 41 at 54-57).

Alan testified that the slap hurt and that he woke up dazed and afraid that he might be hit again (R. 41 at 57-58). There are no lights in the living room (R. 41 at 75). Initially Alan thought there might be an intruder in the home (R. 41 at 58). Alan testified: "At first I didn't know if it was Brenda or if somebody broke in, and I got up and the first person I saw was Brenda. She–I don't recall if she backed up or walked–turned and walked forward, but she sat down in the corner of the love seat, and she had [the baby] next to her. I grabbed her arm and I socked her in the shoulder" (R. 41 at 63-64). The love seat is next to the couch in an L-formation with a path way between the two (R. 41 at

72). Alan denied telling the officers that Brenda was holding the baby but testified that the baby was next to her on the love seat (R. 41 at 72). The distance from where Alan was sleeping to the love seat is 6-10 feet (R. 41 at 73). As Alan got up from the couch, Brenda was moving toward the love seat (R. R1 at 75).

Alan acknowledged that he punched her twice on the right shoulder and once on the left shoulder (R. 41 at 64). Alan then realized what was happening and went into the bedroom and locked the door until the police came (R. 41 at 64).

Alan testified that Brenda had slapped and punched him on 8-9 different occasions during their 2.5 year marriage (R. 41 at 60). On each occasion she had struck him more than once (R. 41 at 61). Alan had to restrain her in the past when she hit him (R. 41 at 63). On Halloween of 2001, Alan testified that Brenda was "hitting me" and she "started breaking things around the house, and she called the police on me, and I–you know, I've never hit her before" (R. 41 at 61-62). The police came and Brenda was arrested and taken into custody for assault (R. 41 at 64-65). Brenda also had spent 1.5 years in the Utah State Hospital R. 41 at (62-63).

SUMMARY OF ARGUMENT

Alan asserts that the trial court erred in its conclusion that the State proved beyond a reasonable doubt that he did not act in self-defense. Alan asserts that the trial court's findings are against the clear weight of the evidence and that this Court should have a definite and firm conviction that a mistake has been made and that the evidence presented is contrary to Judge Pullan's verdict. Accordingly, because Alan's assault against Brenda was justified as self-defense, the trial court erred in convicting him of assault and of domestic violence in the presence of a child. For a conviction of domestic violence in the

presence of a child, a class B misdemeanor, an act of domestic violence must occur in the presence of a child. Utah Code Annotated § 76-5-109.1(2)(c). Utah Code Annotated § 77-36-1(2) defines "domestic violence" as a criminal offense–including. Because Alan committed no underlying criminal offense, he cannot be guilty of domestic violence in the presence of a child.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN CONCLUDING THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THAT ALAN'S CONDUCT WAS NOT JUSTIFIED AS SELF-DEFENSE.

Alan Fitz asserts that the court erred in finding that the evidence was sufficient to establish, beyond a reasonable doubt, that he did not act in self-defense. "A defendant is entitled to an acquittal if based upon the whole evidence in the case there is a reasonable doubt as to whether or not the defendant acted in self-defense." *State v. Jackson*, 528 P.2d 145, 147 (Utah 1974). *See also*, *State v. Torres*, 619 P.2d 694, 695 (Utah 1980) (defendant has no particular burden of proof but is entitled to acquittal if there is any basis in the evidence sufficient to create reasonable doubt).

When reviewing challenges to the sufficiency of the evidence from a bench trial this Court will reverse if the findings are against the clear weight of the evidence, or if this Court "otherwise reaches a definite and firm conviction that a mistake has been made." *State v. Strieby*, 790 P.2d 98, 100 (Utah App. 1990) (citations omitted). "This standard of review is less deferential than that applied in a jury trial because of the multi-member versus single fact finder, and requires that the evidence presented not be contrary to the verdict." *Id.* (citing *State v. Goodman*, 763 P.2d 786, 786-87 (Utah 1988)).

Alan was charged with assault, domestic violence and child endangerment for punching his wife, Brenda, in the shoulders after she, unprovoked, slapped him across the face as he slept on the couch at 3 a.m. Brenda had red marks on her shoulders and arms. Brenda chose not to testify at trial. Alan claimed at trial that he committed no crime because he acted in self-defense. Judge Pullan acquitted Alan of child endangerment and convicted him of assault and domestic violence in the presence of a child. Specifically, Judge Pullan found:

> ... Having considered the testimony, the Court in this matter, [notes] for the record that there is no question that on September 26, 2003, the defendant committed an act that caused bodily injury to Brenda Fitz.... The only question before the Court is whether or not the force used by [Alan] Fitz was lawful.
>
> That requires the Court to determine whether or not his acts were justified under Section 76-2-402 of the Utah Code. Subsection (1) of that statute provides that, "A person is justified in using force against another when and to the extent that he reasonably believes that force is necessary to defend himself against another's imminent use of unlawful force."
>
> Under that statute the defendant's belief must be reasonable as to the time that force is used, and to the extent that force is used.
>
> In determining in whether his belief was reasonable, I am to consider the factors set forth in subsection (5). I can also consider those same factors in determining whether or not continued force by Brenda Fitz was imminent.
>
> In this matter there is no question that Brenda Fitz committed an act of domestic violence, that she initiated at least the physical portion of the confrontation by striking the defendant as he slept on the couch. The issue before

the Court that I have to determine is whether or not continued violence on her part was imminent and whether or not the defendant's belief as to the force that he used in response was reasonable.

So considering the factors under subsection (5) the nature of the danger posed to the defendant was minimal. Ms. Fitz slapped him with an open hand on the face. It was a single slap. As to the immediacy of the danger, Ms. Fitz retreated then to the couch. She sat down immediately next to a child who had been born approximately two weeks earlier.

There was no probability that the force used by Ms. Fitz would cause death or serious bodily injury. It's true that... that Ms. Fitz had some violent propensities and had engaged in prior acts of violence against the defendant. The testimony is that those acts occurred by way of slapping approximately every two weeks for a substantial period of time, and that during the two-and-one-half year marriage he had been punched eight to nine times by Ms. Fitz. He further testified that he hand never struck her.

There was a pattern of abuse in the relationship. However, balancing the first three factors against those two, in considering that this event was not in accordance with that pattern of conduct, I am convinced that the State has met its burden of proof that they have convinced me beyond a reasonable doubt that the defendant did not act in self defense.

For that reason I am going to find the defendant guilty as to Counts I and II of the Information

(R. 41 at 92-94).

Alan asserts that the trial court's findings are against the clear weight of the

evidence and that this Court should reach a definite and firm conviction that a mistake has been made. *Strieby*, 790 P.2d at 100. "This standard of review is less deferential than that applied in a jury trial because of the multi-member versus single fact finder, and requires that the evidence presented not be contrary to the verdict." *Id.* (citation omitted). Moreover, Fitz has no burdern proof but is "entitled to an acquittal if based upon the whole evidence in the case there is a reasonable doubt as to whether or not the defendant acted in self-defense." *State v. Jackson*, 528 P.2d 145, 147 (Utah 1974). *See also*, *State v. Torres*, 619 P.2d 694, 695 (Utah 1980) (defendant has no particular burden of proof but is entitled to acquittal if there is any basis in the evidence sufficient to create reasonable doubt).

Utah Code Annotated § 76-2-402(1) states that "A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force." The factors in subsection (5), referenced by Judge Pullan, which the trier of fact may use in its determination of imminence or reasonableness, are as follows: One, "the nature of the danger." Two, "the immediacy of the danger." Three, "the probability that the unlawful force would result in death or serious bodily injury." Four, "the other's prior violent acts or violent propensities." Five, "any patterns of abuse or violence in the parties' relationship." Utah Code Ann. § 76-2-402(5).

Alan has marshaled the evidence in his statement of the facts and will review that marshaling here as necessary to his argument.

One, Judge Pullan found "the nature of the danger posed to the defendant was minimal. Ms. Fitz slapped him with an open hand on the face. It was a single slap" (R.

41 at 93). While it is true that Brenda executed a single, open hand slap to Alan's face, Alan asserts that trial court ignored other pieces of evidence which are relevant to a consideration of the "nature of the danger." First, in the past when Brenda has struck Alan, she frequently struck him multiple times and that she had to be restrained (R. 41 at 60, 61, 63). The fact that she had only slapped him once on this occasion does not mean that he was not in danger of more assaultive behavior from Brenda. Subsection (1) only requires that Alan reasonably believe that force is necessary to defend himself against Brenda's imminent use of unlawful force. An unprovoked slap to a sleeping individual's face is unlawful. Sleep, Alan asserts, is when an individual is at there most vulnerable and the first initial moments following a sudden (and painful) awakening are confusing which may affect an individual's perception of events.

Moreover, in this case Brenda was the aggressor. The trial court correctly found that she committed an act of (uncharged) domestic violence and was the initiator of the physical confrontation (R. 41 at 93). Utah Code Annotated § 76-2-402(2)(c)(I) indicates that a person who is the aggressor is not entitled to make a claim of self-defense for the use of force. "An aggressor is one who willingly and knowingly initially provokes a combat or does acts of such a nature as would ordinarily lead to combat." *State v. Schoenfeld*, 545 P.2d 193, 196 (Utah 1976). *See also*, *State v. Starks*, 627 P.2d 88, 90 (Utah 1981). Additionally, "if one who initially was a nonaggressor escalates a fight beyond a level which would be justified in view of the nature of the original provocation, then he loses the right to claim the defense of self-defense. *Starks*, 627 P.2d at 90 (citation omitted). Brenda's act was one of knowing provocation that would ordinarily lead to combat. Alan asserts that he did not escalate the nature of the incident beyond a level which would be justified under Brenda's original provocation. Brenda slapped him

across the face while he slept. When he awoke suddenly, he was in pain and he was dazed. Punching her on the shoulder three times in approximately the first 6 seconds after he awoke (R. 41 at 58, 69) is reasonable and justified.

Two, the trial court found that "as to the immediacy of the danger, Ms. Fitz retreated then to the couch. She sat down immediately next to a child who had been born approximately two weeks earlier." Alan testified that when he was getting up from the couch after being suddenly awakened from a blow to the face, Brenda was moving towards the love seat, which is next to the couch approximately 6-10 feet away (R. 41 at 63-64, 75). The trial court failed to consider the timing and immediacy of Alan's response which took place in a matter of a few seconds (R. 41 at 58, 69). The fact that she was moving away from him in these circumstances does not negate his reasonable belief as to the immediacy of the danger–including whether he was going to be struck by her again or initially whether there was an intruder in the home. As the aggressor, if she had been cited for assault, then she could only claim self-defense if she had "withdraw[n] from the encounter and effectively communicate[d] [to Alan her] intent to do so." Utah Code Annotated § 76-2-402(2)(c)(I). Brenda may have been moving away from Alan but it was only seconds after she assaulted him out of sleep and in the process she clearly communicated no intent to withdraw from the encounter.

Three, Judge Pullan found that there was "no probability that the force used by Ms. Fitz would cause death or serious bodily injury" (R. 41 at 94). Alan acknowledges that the probability of serious bodily injury or death from a slap across the face is slight, however, he was in a very vulnerable position when that blow to the face unexpectedly occurred. In addition, the ensuing confusion from being so suddenly and drastically awakened likely affected his ability to perceive, in the short time between the blow and

his response, the likelihood of such an injury.

Four, Judge Pullan correctly found that Brenda had violent propensities and that she had engaged in prior acts of violence against Alan; and that he had previously, never physically struck her in response.

Five, Judge Pullan also correctly found that there was a pattern of abuse in the relationship. Alan asserts that the pattern was that she was the aggressor and the perpetrator and he was the victim. Utah Code Annotated § 77-36-1(3) defines "victim" as a cohabitant who has been subjected to domestic violence.

However, Alan asserts that Judge Pullan was mistaken in finding that the first three factors weighed against a finding of reasonableness or imminence. Alan asserts that all five factors weigh in favor of a conclusion that his belief that force was necessary to defend himself against Brenda's imminent use of unlawful force. Alan asserts that the trial court's findings are against the clear weight of the evidence and that this Court should have a definite and firm conviction that a mistake has been made and that the evidence presented is contrary to Judge Pullan's verdict.

Accordingly, because Alan's assault against Brenda was justified as self-defense, the trial court erred in convicting him of assault and of domestic violence in the presence of a child. For a conviction of domestic violence in the presence of a child, a class B misdemeanor, an act of domestic violence must occur in the presence of a child. Utah Code Annotated § 76-5-109.1(2)(c). Utah Code Annotated § 77-36-1(2) defines "domestic violence" as a criminal offense–including. Because Alan committed no underlying criminal offense, he cannot be guilty of domestic violence in the presence of a child.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Fitz asks that this Court conclude that trial counsel erred in determining that his action was not justified as self-defense pursuant to Utah Code Annotated § 76-2-402. Accordingly, Fitz asks that this Court reverse his convictions for assault and domestic violence in the presence of a child because the evidence was insufficient to establish–beyond a reasonable doubt–that he did not act in self-defense.

RESPECTFULLY SUBMITTED this 25th day of February, 2005.

MARGARRET P. LINDSAY
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed, first-class mail postage pre-paid, four (4) true and correct copies of the foregoing Brief Of Appellant to Donna Kelly, Deputy Utah County Attorney, 100 East Center Street, Suite 2100, Provo, Utah 84606 this 25th day of February, 2005.